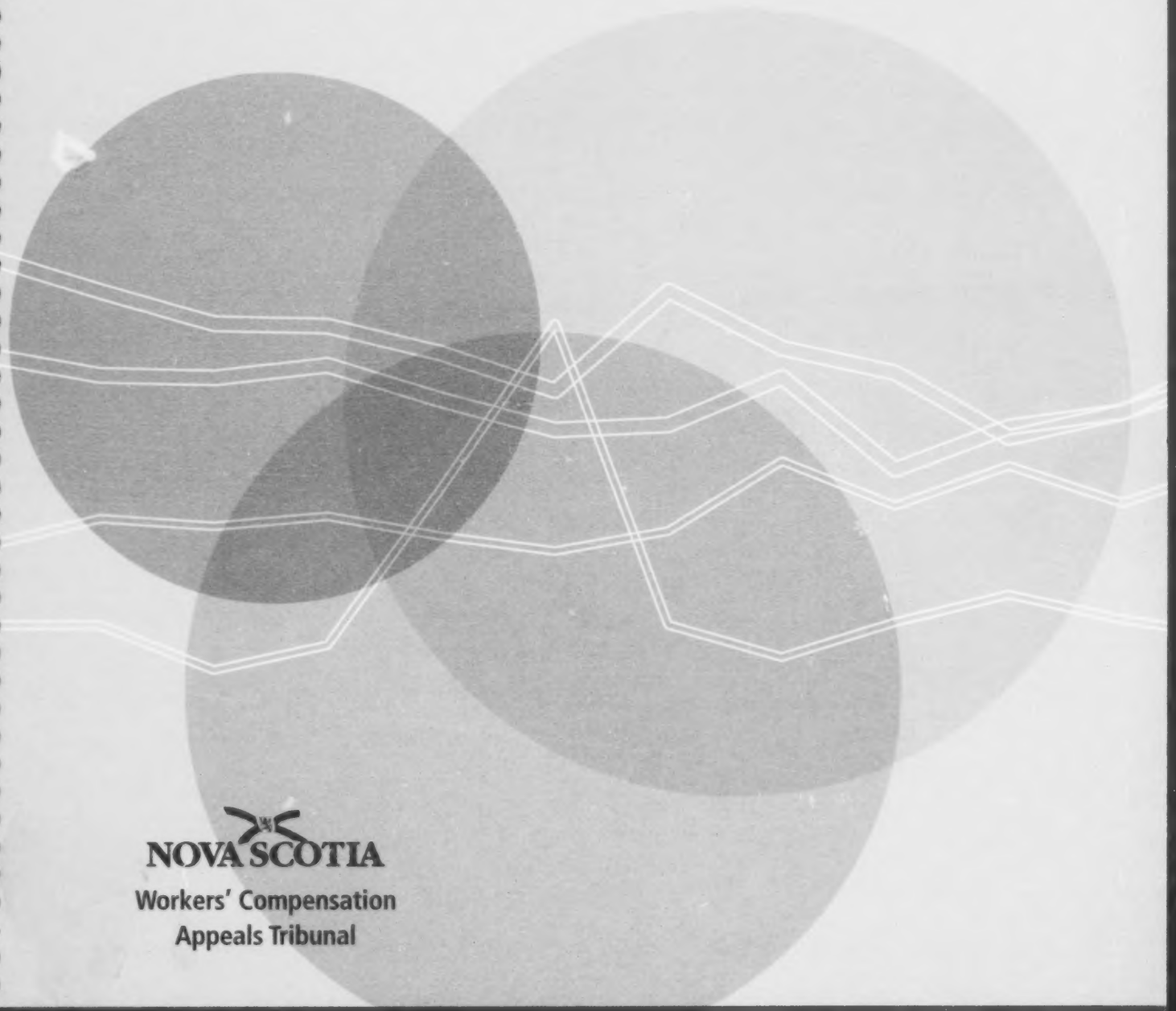
Workers' Compensation Appeals Tribunal

Annual Report
for the year ending March 31, 2005



NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

105-05628/

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Appeals Tribunal

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Workers' Compensation Appeals Tribunal

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To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor of Nova Scotia

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the fiscal year ending March 31, 2005.

Respectfully submitted,

Michael G. Baker, Q.C.
Minister Responsible for Part II of the *Workers' Compensation Act*

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Michael G. Baker, Q.C.
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2005.

Respectfully submitted,

Louanne Labelle

Louanne Labelle
Acting Chief Appeal Commissioner

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Executive Summary

Introduction

The Workers' Compensation Appeals Tribunal works with several partner agencies within a framework known as the Workplace Safety and Insurance System (WSIS). Our partner agencies are the Workers' Compensation Board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety Division of the Department of Environment and Labour.

The Workers' Compensation Appeals Tribunal Annual Report for the year 2004–05 highlights three areas: the adjudication of appeals, dominated by the processing of over 200 chronic pain appeals; internally, the completion of key appeal-management initiatives to ensure a more efficient administrative process; externally, participation in several joint initiatives with our partner agencies.

Chronic Pain Appeals

At the end of the last fiscal year, approximately 168 appeals raising the issue of chronic pain were on hold pending the enactment of new legislation. In July 2004, new regulations were enacted by Cabinet. Beginning in August, the tribunal began the processing of these appeals. Eventually, 211 appeals involving chronic pain were referred back to the hearing officer level of the Workers' Compensation Board, to be returned to the board's transition services team for assessment of eligibility under the new regulations. More than 300 chronic pain appeals on hold at the Court of Appeal were also returned by consent order to the board for adjudication.

The fact that the tribunal processed such a large number of appeals by means of a section 251 (of the Workers' Compensation Act, S.N.S. 1994–95, c. 10 as amended) referral following, for the most part, written submission has marked the statistical summary of the tribunal's operations.

Operations

Overall, the number of appeals received by the tribunal has decreased by 26 per cent, and the number of decisions rendered has increased by 8 per cent, over the previous year. Although the chronic pain appeals have lowered the number of appeals resolved by oral hearing to 39 per cent, over 50 per cent of non-chronic pain appeals are being heard by oral hearing, an increase over last year. Timeliness has also been affected by the resolution of the chronic pain appeals. Overall, 53.37 per cent of appeals were resolved within six months. However, in the last quarter of the year, for example, 65.5 per cent were resolved within the same time frame.

The majority of appeals continue to be filed by workers (94 per cent). Workers continue to be represented, in the main, by the WAP (72 per cent), with approximately 20 per cent of workers unrepresented. At year-end, 302 appeals remained with the tribunal for adjudication.

Charter Challenge

In 2005, the tribunal issued its first major constitutional decisions since the Supreme Court of Canada's decision in *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No.54; a tribunal panel found that, although ss. 37(9) and (10) of the act contravened the Charter of Rights and Freedoms, they were saved by s. 1 of the Charter. These decisions have not been appealed.

Innovation

On February 22, 2005, the tribunal's support staff and appeal commissioners held a day-long strategic planning session to review the past year's accomplishments and to identify objectives and initiatives for the fiscal year 2005–06. Several key initiatives were completed in achieving our strategic goal of delivering high-quality service in the resolution of appeals.

In the last half of the year just ended, emphasis was placed on completing our case management review process to implement a more streamlined and efficient appeal management system. The board's Information Technology department worked with the tribunal to develop new reports using the board's AS400 database, which will allow the tribunal to track more efficiently the status of appeals.

The tribunal prepared a draft Practice Manual incorporating all current practices and policies. The draft was circulated for feedback to all regular tribunal participants, including the WAP, the board, injured workers' groups, and employer representatives. The Practice Manual is designed as a reference tool for both the tribunal and participants who appear before it. The purpose of the manual is to better ensure fairness, predictability, consistency, transparency, and efficiency in all functions performed by the tribunal. The tribunal took the opportunity to meet with regular participants to discuss implementation of the Practice Manual, together with any other issues of concern.

The conclusion of pilot projects on oral hearing and paper review scheduling led the tribunal to adopt a flexible approach to scheduling, while implementing an appeal-readiness policy which sets parameters for the scheduling of appeals.

The tribunal finalized an outline of parameters for performance measures in light of its statutory mandate, addressing, particularly, timeliness and communications concerns raised in a previous worker survey.

The tribunal began revising its website with the assistance of Communications Nova Scotia. The tribunal also revised three information pamphlets, entitled *Appealing a Hearing Officer Decision; A Guide to Oral Hearings*; and *A Guide to Appeals Proceeding by Written Submission*; and prepared a new pamphlet entitled *Employer Participation*. These pamphlets are designed to provide unrepresented participants (workers and employers) with easily accessible, basic information on tribunal proceedings.

The tribunal completed its Self-Represented Worker Project, implementing a new approach to assist self-represented workers with the appeal process. The project objectives were aligned with the results of our initial worker-satisfaction survey conducted in the summer of 2003. The tribunal implemented a self-represented worker procedure that includes direct telephone contact to assist the worker with their understanding of the appeal process. As well, a FAQ (Frequently Asked Questions) protocol was developed for the use of tribunal staff to improve telephone communication with clients.

Appeal commissioners participated in training sessions in decision writing, the conduct of an oral hearing, and American Medical Association training. An employee-satisfaction survey was completed, which identified internal opportunities for improvement. Appeal commissioners also adopted a code of conduct. Staff were offered many training opportunities to better-handle appeal management and communication with tribunal stakeholders.

Inter-agency Cooperation

The past year also saw many inter-agency projects including an advanced decision writing workshop involving appeal commissioners from the tribunal and hearing officers from the board's Internal Appeals department. One of the objectives of the workshop was "to bring a reader-oriented perspective to making and writing decisions." This was aligned with the WSIS strategic goal of improving service delivery and specifically addressed joint agency training and increasing understandability of communication.

The tribunal participated in a training program intended for the adjudicators in the board's transition services team. The tribunal provided an overview of the its mandate and operations as well as an overview, from a historical perspective, of the tribunal's interpretation of the chronic pain legislation. A second session was also held involving other board case managers and medical advisors.

In October 2004, the tribunal hosted a one-day conference on the application of the American Medical Association Guides to the Evaluation of Permanent Impairment. The AMA Guides are well-accepted guidelines in the medical community. They are used by the board in recognizing and quantifying permanent medical impairments for workers injured on and after January 1, 2000.

The conference was truly unique and tailored to the needs of attendees. Two specialists from Ontario, a neurologist and an orthopaedic surgeon, gave presentations on upper and lower extremity and back impairments. The neurologist and a board physician also spoke about pain-related impairments and recent regulations and policies to be applied with respect to chronic pain under the act.

While the tribunal took the lead in planning and organizing this conference, it was a cooperative venture sponsored by the tribunal, the Workers' Advisers Program, and the Workers' Compensation Board. Members from all three agencies attended the conference, including first-line board decision-makers, board hearing officers, board managers, board medical advisors, workers' advisers, and tribunal appeal commissioners. The conference was both timely and well received.

The tribunal also participated in the following joint initiatives with partner agencies in WSIS:

- an Issue-Resolution Working Group composed of representatives of WCAT, WAP, WCB Internal Appeals, and WCB Client Services division whose mandate is to develop and implement issue resolution initiatives that will support and improve communication, information sharing, and overall efficiency of the workers' compensation system
- an Appeal Issues Discussion Group made up of representatives of WCAT, WAP, and the WCB facilitates the informal exchange of information between the three levels of workers' compensation decision-making about recurrent issues and their resolution
- a WSIS performance measures advisory committee formed to review and revise, or propose new, performance standards for the system as a whole

As Acting Chief Appeal Commissioner, I also participated in the Coordinating Committee meetings involving the four WSIS agencies. The mandate of the Coordinating Committee is to meet on a regular basis to oversee and improve joint initiatives undertaken by the partner agencies and to promote cooperation in the implementation of the system strategic plan.

Financial Operations

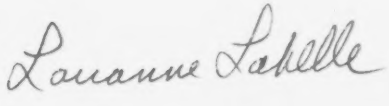
Financially, the tribunal's total expenditures were within 71 per cent of the original authority and within 95 per cent of our revised forecast. Expenditures for 2004–05 were actually 13 per cent under the expenditures for 2003–04, totaling $1,277,005.83.

This was due to several unforeseen events including an appeal commissioner taking a one-year leave of absence, the former Chief Appeal Commissioner leaving for a two-year term with Justice in early July, and reduced rent expenses because of a forced relocation to the World Trade and Convention Centre following a flood at 5151 Terminal Road.

Conclusion

This year was also marked by other significant changes. In July 2004, I accepted the position of Acting Chief Appeal Commissioner, following the departure of Katherine Carrigan, and have thoroughly enjoyed meeting the challenges of my new position. I look forward to the challenges that will face WSIS in the coming year. At the end of November 2004, the tribunal moved into new premises at 5670 Spring Garden Road. The purpose-designed space provides the tribunal with facilities to host two hearings simultaneously. The premises are accessible and provide parking to our clients at the nearby Spring Garden Place, including accessible parking.

Key initiatives for the coming year include the setting of benchmarks for the performance targets and measures as established by the tribunal, as well as completing the review of performance measures for individual appeal commissioners aligned with the tribunal's measures. The tribunal will repeat worker and employee surveys and continue revising our website. We will closely monitor the implementation of our appeal management initiatives, particularly flexible scheduling and appeal readiness policies. We will cooperate with our partner agencies in implementation performance measures for the system and revising the system strategic plan. As Acting Chief Appeal Commissioner, I will also continue to participate in any opportunity I might have to relate to our stakeholders, outside of the appeal system, in order to receive feedback on concerns and to promote a better understanding of the workers' compensation system.



Louanne Labelle
Acting Chief Appeal Commissioner

Introduction

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The Workers' Compensation Appeals Tribunal Annual Report for the year 2004–05 will highlight three areas: the adjudication of appeals, dominated by the processing of over 200 chronic pain appeals; internally, the completion of key appeal-management initiatives to ensure a more efficient administrative process; externally, participation in several joint initiatives with our partner-agencies.

While this annual report will suggest that the past year has been anything but typical, it does not fully reflect how flexible support staff and appeal commissioners, alike, have been. The extremely rapid response in the resolution of chronic pain appeals, the packing and shifting of offices three times within nine months, the whole-hearted participation in the larger WSIS environment in order to make the system more responsive and cost-effective all speak to the professionalism of the tribunal in an environment that is increasingly sensitive to compensation levels and costs.

Mandate & Performance Measures

The Workers' Compensation Appeals Tribunal hears appeals from final decisions of hearing officers of the Workers' Compensation Board, and determines whether the act bars a right of action against employers. Although governed by the same enabling statute as the board, it is legally and administratively separate from the board, and is not bound by board decisions or opinions, ensuring a truly independent review of contested outcomes.

In the processing and adjudication of appeals, the tribunal strives to strike a balance between procedural efficiency and fairness. Its work is directed by principles of administrative law, by statute, and by decisions of superior courts.

Its performance is shaped by, and measured against, several parameters drawn from the Worker's Compensation Act (the "act," as amended) and by its own survey of client groups (chiefly, injured workers).

The act dictates the following, which lend themselves to performance measures:

- ***WCAT shall determine its own procedures ...***
  The tribunal has developed, and continues to develop, rules of procedure which it makes available to members of the public.

- ***WCAT shall notify the Board that an appeal has been filed ...***
  The tribunal always, and quickly, gives notice to the board that an appeal has been filed, and of the issues raised by an appeal.

- ***WCAT's decisions shall be communicated in writing ...***
  The tribunal communicates its decisions only in writing.

- ***WCAT shall decide an appeal within 60 days ...***
  Appeal commissioners decide most appeals within 30 days of the completion of a hearing or the receipt of written submissions.

- ***WCAT shall issue decisions clearly stating the determination of the tribunal on the issues before it, giving reasons without undue elaboration ...***
  Most tribunal decisions are delivered in five or fewer standard pages and are generally understood by most parties to the appeal.

- ***WCAT shall record oral evidence given in the course of a hearing ...***
  All oral hearings are recorded.

- ***WCAT shall make an annual report ...***
  The tribunal has reported in writing to the Minister of Justice within 90 days of each fiscal year end.

However, early surveying of worker-appellants has revealed some degree of dissatisfaction with the timeliness of appeal proceedings and with the clarity of tribunal communications. As a consequence, the tribunal has adopted in 2004–05 the following, additional performance targets:

- ***Expedited processing***
  When the tribunal receives notice of an appeal, it will determine the mode of appeal (by written submission or oral hearing) and communicate that decision to the participants within 15 days.

- ***Expedited adjudication***
  When an appeal is filed and participants indicate that they are ready to proceed with the appeal without needing to obtain additional evidence, the tribunal will schedule the appeal for adjudication within 45 days of the determination of readiness. This is intended to address, in particular, the unrepresented appellant, or an appeal "on the record" (where a participant is arguing that current evidence should lead to a different result as had been obtained at the board level, and so new or additional evidence will not be presented).

In all other instances, where participants to an appeal are not ready to proceed at the time notice of the appeal is filed, the tribunal will require the participants to advise when they are ready to proceed. This is intended to make clear to the participants the time-impact of delays to obtain medical/ expert/ other evidence. In cases where a delay is encountered (> 90 days), the tribunal will request an explanation for the continued delay. Where an extraordinary delay (> 180 days) is encountered, the tribunal may proceed to set an appeal down for adjudication in the absence of an indication of readiness.

Although the act requires a decision in writing in an appeal to be made by the tribunal within 60 days of the completion of an oral hearing, or receipt of final submissions (in the case of an appeal by written submission), the tribunal has adopted a performance standard of 30 days in which to issue a decision.

It is important to note that much of the current delay between the filing of a Notice of Appeal and the rendering of a written decision arises from the difficulty appellants have in obtaining legal representation and/or (expert) medical investigation and reports.

- *Improved communications*
  The tribunal has adopted a process whereby telephone contact is made with unrepresented appellants. An appeal commissioner speaks with the unrepresented appellant to answer questions regarding procedure, deadlines, and the nature of evidence.

  The tribunal has also developed an information pamphlet which explains how to appeal a hearing officer's decision, and pamphlets that describe the adjudication process for both oral hearings and appeals by written submission, for workers as well as employers.

  In reaching its decisions, the tribunal often has to deal with complex issues of law and technical (usually medical) information. The tribunal has developed decision-quality guidelines that are intended to allow its decisions to be more readily understood by lay readers.

To ensure its continuing effectiveness as an adjudicative agency, the tribunal will monitor, or continue to monitor, the following broad indicators on a year-over-year basis:

- time to decision, as a gross measure, including delays requested by participants
- percentage of appeal decisions issued which are the subject of appeal to the Nova Scotia Court of Appeal
- average cost per appeal, excluding extraordinary items
- client satisfaction, as indicated by annual survey results

Adjudication –

The tribunal's "core business"

Please see Appendix 1 containing specific data for the following figures.

In the fiscal year 2004–05, the tribunal released 783 decisions, just over 94 per cent of which were appeals filed by injured workers, with just under 4 per cent filed by employers (see Figure 1).

Overall, the number of appeals received by the tribunal has decreased by 26 per cent (see Figure 2), and the number of decisions rendered has increased by 8 per cent (see Figure 3), over the previous year. One of the factors in the reduction in appeals filed is a change in approach by the board to handling internal appeals (those from case manager decisions appealed to hearing officers). Historically, of those decisions made by board hearing officers denying appeals by workers, 80 per cent are appealed to the tribunal.

Figure 1
Decisions by Appellant Type

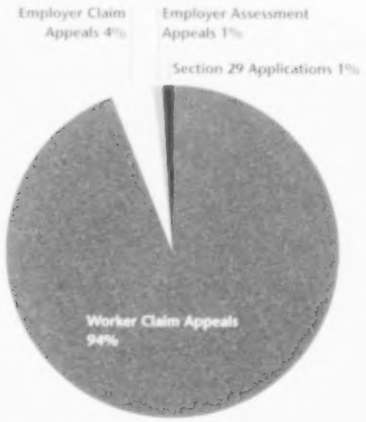
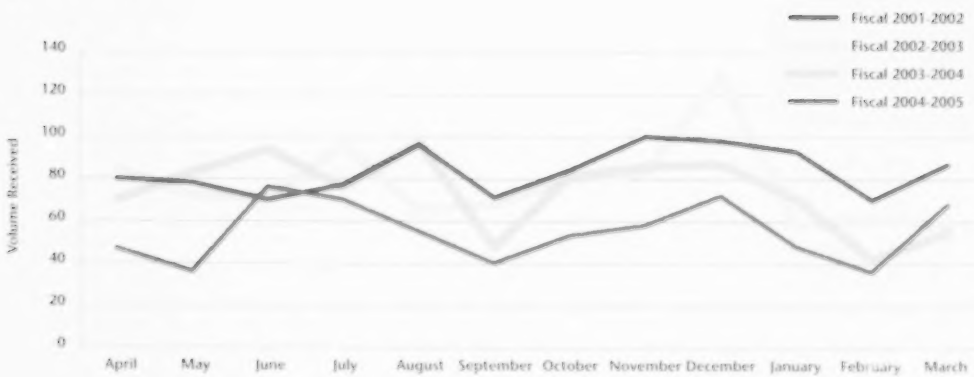


Figure 2
Appeals Received



Although the chronic pain appeals have lowered the number of appeals resolved by oral hearing to 39 per cent (see Figure 4), over 50 per cent of non-chronic pain appeals are being heard by oral hearing, an increase over last year.

Figure 4
Decisions by Mode of Hearing

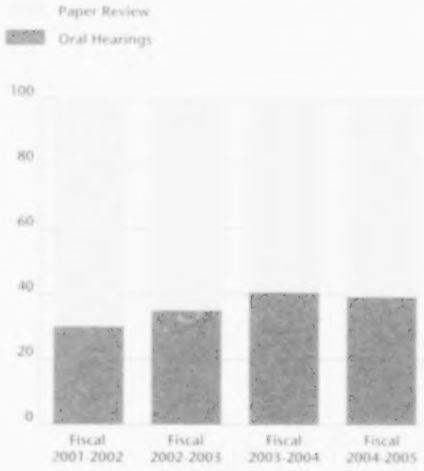
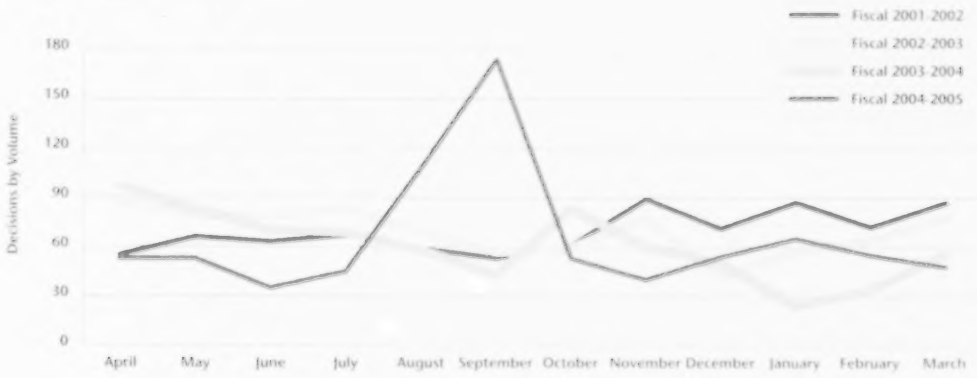


Figure 3
Decisions Rendered



Timeliness has also been affected by the resolution of the chronic pain appeals. Overall, 53.37 per cent of appeals were resolved within six months (see Figure 5). However, in the last quarter of the year, for example, 65.5 per cent were resolved within the same time frame.

Appeals, whether filed by workers or employers, may address more than one issue. In the issue-tracking system used by the tribunal for worker-initiated appeals, 10 separate issue categories are identified. Of the 783 appeal decisions issued, new or additional temporary benefits, or increased permanent benefits, were central in 480 appeals. Medical aid was an issue in 140 appeals. New or additional extended earnings-replacement benefits were an issue in 87 appeals. (See Figure 6 for a complete breakdown by category.)

Figure 5
Timeliness to Decision

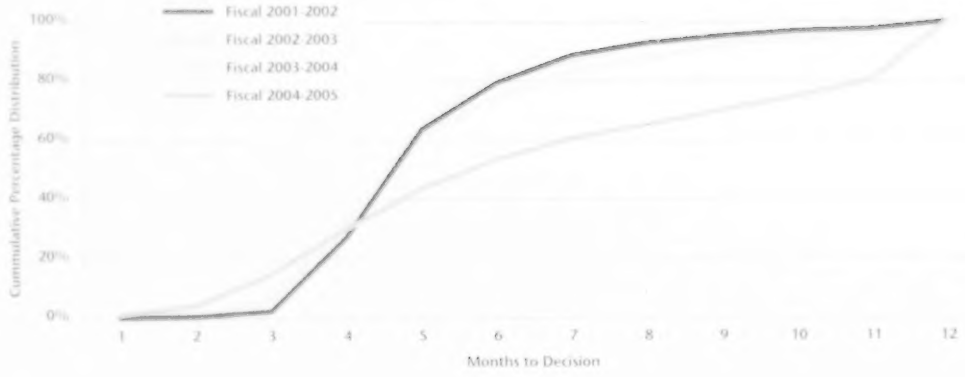
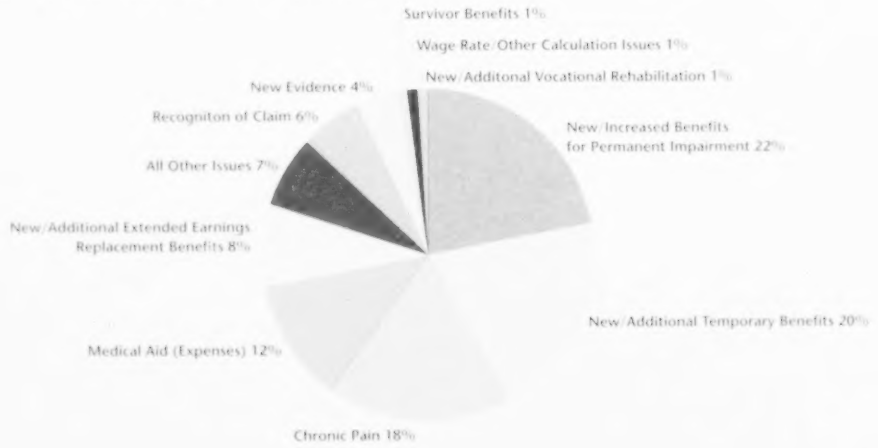


Figure 6
Decisions by Issue Categories – Worker



In employer-initiated appeals, the initial acceptance by the board of a worker's claim, and the extent of benefits payable or paid, represent the two most frequent issues raised, followed by the employer's assessment classification (see Figure 7).

In 2004–05, of 783 decisions rendered, 232 appeals were allowed, 75 were allowed in part, 182 were denied, and 290 were referred back to the hearing officer for varied reasons (see Figure 8). Four of the 783 determined applications brought under s. 29 of the act.

Workers continue to be represented, in the main, by the WAP (72 per cent), with approximately 20 per cent of workers unrepresented.

At year-end, 302 appeals remained with the tribunal for adjudication (see Figure 9 for year-over-year comparisons).

Figure 7
Decisions by Issue Categories – Employer

Figure 8
Decisions by Outcome

In employer-initiated appeals, the initial acceptance by the board of a worker's claim, and the extent of benefits payable or paid, represent the two most frequent issues raised, followed by the employer's assessment classification (see Figure 7).

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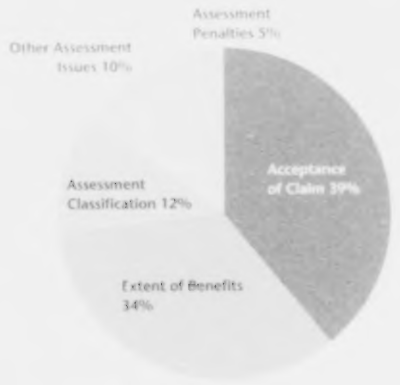


Figure 8
Decisions by Outcome

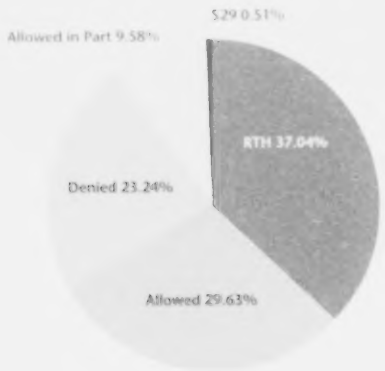
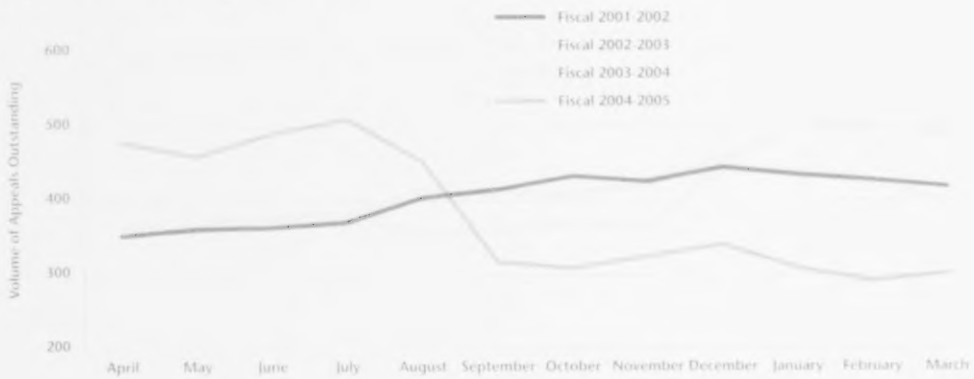


Figure 9
Appeals Outstanding at Year End



Noteworthy Decision Review by Type

Chronic Pain Appeals

Over 200 chronic pain appeals at the tribunal had been adjourned pending enactment of new legislation in response to the Supreme Court of Canada's decision in *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] S.C.J. No. 54 (October 3, 2003).

In response to the Martin decision, the Province of Nova Scotia enacted regulations to deal with chronic pain. The Chronic Pain Regulations were enacted by Order-in-Council dated July 22, 2004, [N.S.Reg. 187/2004]. The Workers' Compensation Board formed the transition services team to adjudicate claims that may be impacted by the Chronic Pain Regulations.

In early August 2004, the tribunal advised all participants in appeals raising the issue of chronic pain that it was considering referring these appeals back to the hearing officer for reconsideration and requested submissions on this issue. The tribunal sought input from its stakeholders about how it should resolve these appeals. It also gave participants in each of the individual appeals an opportunity to make submissions about how their matter should be resolved. Most participants agreed to have the appeals referred back and, therefore, the majority of these appeals were resolved by means of a s. 251 referral.

Eventually, 211 appeals involving chronic pain were referred back to the hearing officer level of the Workers' Compensation Board, to be returned to the board's transition services team for assessment of eligibility under the new regulations.

Most of the 323 chronic pain appeals on hold at the Court of Appeal were also returned by consent order to the board for adjudication.

As of March 31, 2005, there were only six chronic pain appeals left at the Court of Appeal. These appeals remain at the Court of Appeal because representatives have not been able to contact their clients for instructions.

The fact that the tribunal processed such a large number of appeals by means of a s. 251 referral following, for the most part, written submission has marked the statistical summary of the tribunal's operations.

Section 251 Referrals to Board Hearing Officer (non-chronic pain appeals)

Section 251 of the act permits the tribunal to refer appeals back to the hearing officers for reconsideration. Referrals may occur where the quantity or nature or new or additional evidence, or the disposition of an appeal, merits the referral. The tribunal may make a referral at any point in the hearing of an appeal. In practical terms, appeals are generally referred back for one of five reasons:

- to enable hearing officers to reconsider their decisions in light of new or additional evidence that becomes available
- to enable hearing officers to consider all of the evidence and issues that are relevant to appeals
- to expedite claim management
- to consolidate issues that need to be adjudicated
- to make use of the board's resources to gather further relevant evidence

The tribunal has increasingly used referrals to resolve appeals since the 2002–03 fiscal year. This trend continued in 2004–05, when the tribunal referred 79 appeals back to the hearing officers. This figure represents approximately 14 per cent of the appeals the tribunal resolved during the fiscal year (not including chronic-pain-related referrals, discussed above).

Board hearing officers issued 41 final reconsideration decisions following referrals from the tribunal. Their reconsiderations resulted in 22 denials (54 per cent); 7 appeals allowed (17 per cent); and 12 appeals allowed in part (29 per cent).

- Referrals arising from new and additional evidence

The tribunal has consistently held that the act contemplates that the board will be the adjudicator of first instance. Consequently, the tribunal generally refers appeals back to the hearing officers for reconsideration when it receives new or additional evidence that it feels would have a significant impact upon the hearing officers' original decisions. In 2004–05, the receipt of new or additional evidence accounted for approximately 45 per cent of the tribunal's referrals, the most common reason the tribunal referred appeals back to hearing officers.

- Referrals arising from incomplete adjudication

The tribunal also refers appeals back when it concludes that hearing officers have not considered all of the evidence, or decided all of the issues, that are relevant to an appeal. Incomplete adjudication was the second most common reason the tribunal issued referrals in 2004–05, accounting for slightly over 17 per cent of all referrals.

Decision 2004-150-RTH is an example of a referral the tribunal made in 2004–05 because of incomplete adjudication. The worker had filed five recognized back-injury claims between 1987 and 1995. The issue before the tribunal was whether he had a permanent back impairment. The tribunal concluded that the hearing officer only considered evidence relating to the worker's first back injury, and recognized that the worker had "a right to have his eligibility for a permanent impairment benefit determined on the basis of all the evidence available about his back, not just the evidence contained in his original" claim file. The tribunal referred the appeal back, and directed the hearing officer to reconsider her decision in light of all five of the worker's back injury claims.

- Referrals as a case management tool

Since 2003–04, the tribunal's Registrar has referred appeals back to the hearing officers when her screening reveals obvious situations where reconsideration would be appropriate, particularly where irregularities in the proceedings leading to the appeal have been found. In 2004–05, the Registrar referred 11 appeals back to the hearing officers, as a result of screening.

- Referrals to consolidate issues within claims

The tribunal refers appeals back to hearing officers so that multiple issues arising from a claim can be dealt with comprehensively, or to avoid piece-meal adjudication.

The tribunal issued three consolidation referrals in 2004–05; *Decisions 2004-20-RTH* and *2004-85-RTH* are examples. The referrals resolved two appeals brought by the same worker. The worker had contracted hepatitis-C as a result of an employment-related accident, and the board had recognized that his condition amounted to a permanent impairment. One appeal dealt with the worker's impairment rating. The other dealt with the effective date for his impairment. The tribunal referred both appeals back, in part so that the two related issues raised by the worker's appeals could be dealt with at the same time.

- Section 251 referrals and the board's resources

The tribunal has the ability to gather evidence when it needs additional information properly to resolve an appeal. However, the tribunal often refers these appeals back to the hearing officers in situations where board resources, including its medical staff, can be utilized to obtain the necessary evidence quickly and cost-effectively. The tribunal issued four referrals to access board resources in 2004–05.

- Referrals included with final decisions

The tribunal continued occasionally to resolve some issues within appeals, and to refer other issues in the same appeals back to the hearing officers in 2004–05. These hybrid referrals have the advantage of reducing the number of issues to be resolved within claims. The tribunal issued three combined decisions-and-referrals during 2004–05. *Decision 2003-903-AD-RTH* is an example.

- Other reasons for referrals

The tribunal also uses its discretion to refer appeals back to the hearing officers in situations where irregularities have occurred in the course of the decisions that were ultimately appealed to the tribunal.

Decision 2004-609-RTH is an example of such a situation.

Constitutional Questions/Charter Challenges

The tribunal issued two decisions considering the constitutional validity of the age-based limitations on earnings-loss awards in s. 37 of the act.

In *Decision 2002-811-AD* (January 27, 2005, NSWCAT), a tribunal panel considered specifically a challenge to ss. 37(9)(b) and (10) of the act. In July 2000 the worker, then 66 years of age, was badly injured on the Sable Gas Pipeline Project. The worker was found entitled to, and received, earnings-replacement benefits in the form of temporary earnings-replacement benefits for a period of 24 months. By virtue of s. 37(10) of the act, the board terminated benefits. The worker then brought a challenge to that provision citing the rights and freedoms enumerated in the Canadian Charter of Rights and Freedoms. The panel, as a preliminary matter, found that the tribunal's jurisdiction was limited to a s. 52(1) remedy. It can disregard an offending provision. However, the tribunal is without jurisdiction

to read-in a rebuttable presumption as a remedy. The panel also found that the civil burden of proof – the balance of probabilities – and not s. 187 was applicable in considering a Charter challenge.

In terms of the merits of the challenge, the panel agreed with the worker that ss. 37(9)(b) and 37(10) of the act infringed the equality rights guaranteed by s. 15(1) of the Charter. The challenged provisions draw a distinction based on age, an enumerated class, which amounted to discrimination. Older persons were the subject of historical, stereotypical assumptions, the relationship between age and actual circumstances of a worker was not taken into account, and the ameliorative purpose of the legislation was insufficient to remove the challenged provisions from s. 15(1). The differential treatment of the worker was a substantive discrimination as it was significant and it had the effect of demeaning essential human dignity of the affected person.

However, the infringement was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society pursuant to s. 1 of the Charter (the *Oakes* test). The objectives of the legislation were found to be pressing and substantial. The limits imposed by the challenged provisions were reasonable and justifiable in a free and democratic society. Since s. 37(10) was upheld, it followed that, given his age, the worker was not entitled to earnings-replacement benefits beyond 24 months. The appeal was denied.

In a second decision, *Decision 2003-817-AD* (January 27, 2005, NSWCAT), the same panel considered a challenge to s. 37(9)(b). In 2001, the worker, then aged 61, was badly injured. He was provided a permanent impairment benefit and a partial, extended earnings-replacement benefit. He was able to return to the workplace part-time on modified duties earning less than his pre-injury earnings. His extended benefit was terminated in 2004 when he attained age 65 as provided by s. 37(9)(b) of the act. The worker continued to work part-time after he turned 65 years of age.

The panel recapitulated many of its reasons in *2002-811-AD*, above, so only pertinent differences will be mentioned. At the outset, the panel considered s. 37(9) and s. 37(10) together as a "code." The panel found that s. 37(9)(b) infringed upon the worker's s. 15(1) Charter rights, but was saved under s. 1 of the Charter. Ultimately, the panel found that the worker's extended benefit was properly terminated at age 65.

In *Decision 2004-184-AD* (November 10, 2004, NSWCAT) a tribunal panel decision found that First Nations' band councils were subject to mandatory coverage under the act, *ex proprio vigore* ("by its own authority"). The panel found that the act was properly within the province's constitutional ambit, did not offend against the federal power in s. 91(24) of the Constitution Act, 1867, and was not inconsistent with the provisions of the Indian Act.

Applications under s. 29 of the Act/ Right to Sue

The tribunal considered several interesting applications under s. 29 of the act to determine whether an action was barred as against an employer covered by the act. Many of these applications involve findings relating to whether a worker suffered a "personal injury by accident arising out of and in the course of employment" and are, therefore, very instructive for recognition claims under s. 10(1) of the act.

In *Decision 2004-113-TPA* (April 30, 2004, NSWCAT), a tribunal panel found that the worker's injuries arose out of and in the course of her employment. The employer provided demonstrators for in-store displays. The worker was returning paperwork and equipment to the area manager's home as the home was used for business purposes.

The panel made the following findings:

- the employer was a covered employer under the act; a demonstration business is an occupation incidental to, or immediately connected with, supermarkets or retail stores and establishments (Schedule A of the act)
- the worker was acting as a servant or an agent for the employer
- the area manager's husband was not employed by the employer
- the worker had an employment relationship with the employer, as distinguished from an independent contractor; the panel referred to the decision of *671122 Ontario Limited v. Sagaz Industries Canada Limited* [2001] 2 S.C.R. 983 for authority on the criteria to make that distinction.

Finally, the panel found that the worker's injuries arose out of and in the course of her employment and referred *inter alia* to *Gallie v. New Brunswick (Workplace Health, Safety and Compensation Commission)* [1996] N.B.J. No. 436. The panel found that the accident occurred while the worker was

returning the company's equipment and paperwork after a demonstration. This was a job requirement; but for the employment relationship, she would not have been in the area manager's home. Her returning of the equipment to the home was reasonably incidental to her employment.

In *Decision 2003-799-TPA* (June 14, 2004, NSWCAT), a worker intended to sue alleging breach of contract. It was alleged that the employer had a contractual duty to name the worker as a co-insured in a disability insurance policy. The worker was in an accident and discovered that he was not named, and the insurer denied coverage. The tribunal followed the decision in *Imperial Oil Ltd. v. Parsons* [1998] N.S.J. No. 399 and found that the action was not statute barred as it was actionable without the accident having occurred.

In *Decision 2004-390-TPA* (December 20, 2004, NSWCAT), the worker claimed he was injured while driving a transfer truck at a container terminal. The worker claimed that WM, an employee of the employer, proceeded through a designated stop at the terminal while driving a "shunt truck," and struck the worker's transfer truck. The worker applied to the tribunal under s. 29 for a determination whether his action was barred; the respondents (defendants in the civil action) argued the action was barred. The worker bore the onus of proof as he alleged he fell within the s. 28(2) motor vehicle exception to the statutory bar.

The decision is quite detailed, and should be read if the definition of "highway" per s. 2(u) of the MVA, or a motor vehicle accident on a worksite, is a central issue. The tribunal concluded as follows:

> The company's shunt trucks did not operate outside the terminal, nor were they intended to. The terminal, in general, and the container pier where shunt trucks were used by the company, do not come within the definition of a "highway" pursuant to s. 2(u)(ii) of the MVA. The terminal was not open, either by design or in fact, to members of the general public ... It follows that since the shunt truck was not intended to operate on a highway, it was not required to be registered. Since the shunt truck was not registered or required to be registered under the MVA, the exception under s. 28(2) of the act does not apply and the worker's action against the respondents is barred.

In *Decision 2004-516-TPA* (November 25, 2004, NSWCAT), a covered firm sought a finding that a plaintiff was barred by s. 28 from suing the firm. The plaintiff's status was the central issue. The plaintiff was an officer and director of the company who received income from dividends but was not under contract of service, and the company had little control over the plaintiff. The panel noted that historically the term "worker" meant a member of the working class as opposed to senior management. Section 2(ae) of the act broadens the definition of worker to include active management where they are on the payroll. In this case, the plaintiff was not on the payroll and, therefore, not a worker. The action was not barred by s. 28.

In a Supplementary Decision, *2004-516-TPA-SUPP*, the panel found that the tribunal lacked jurisdiction to award costs on a s. 29 application. The tribunal found that there was no indication that the Legislature intended the tribunal to have the power to award costs. There was no express legislative provision granting such jurisdiction, nor can such a power be inferred by "necessary implication."

Noteworthy Decision Review by Issue

WCB Moves

On October 6, 2004, the Chair of the WCB Board of Directors, Louis R. Comeau, exercised his authority under s. 248 of the act to postpone appeals which involve the compensability of stress under the Government Employees Compensation Act, R. S. C. 1985, c. G-8 ["GECA"], the federal legislation. On December 15, 2004, the chair extended the postponement to 12 months indicating that he was confident, however, that the board of directors would be able to adopt and issue a policy applicable to these appeals prior to the expiry of one year from the date of the postponement, that is, October 6, 2005. Ten such appeals are on hold at the tribunal at year end.

Procedural Issues

Decision 2003-80-PAD (May 31, 2004, NSWCAT) dealt with the admissibility of two pieces of evidence. It identified and applied the relevant factors for determining admissibility. In particular, the tribunal referred to a passage from an administrative law text, MacAulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1988), for the proposition that even though formal rules

of evidence are not applied at a tribunal setting, the values that underlie those rules are still important. Those values were as follows:

- the evidence should help establish a sound factual basis for the decision, i.e., be relevant to the issue under appeal
- the relative harm in accepting the evidence should be balanced against its probative value
- above all, the process should be fair and effective

The tribunal then addressed each of these factors as they pertain to the evidence sought to be admitted in this appeal.

Decision 2004-516-TPA (November 25, 2004, NSWCAT) considered the admissibility of a discovery transcript. The panel found that the implied undertaking rule did not prevent the tribunal from considering the transcript as the tribunal had exclusive jurisdiction to consider whether a defence raised by the employer in the court action bars the action. The tribunal application under s. 29 of the act was, in effect, part of the court proceeding.

Decision 2003-259-AD (April 30, 2004, NSWCAT) considered the finality of a decision to deny a worker an extension to file an appeal. A worker injured in a 1997 motor vehicle accident with post-traumatic stress disorder was denied a permanent medical impairment by a board hearing officer. The date of the decision, not appealed by the worker, was July 6, 1999. The worker subsequently developed a brain aneurysm and hemorrhage. The worker's wife also developed a disability and was unable to pursue the appeal on behalf of the worker for a time.

In a letter received by the tribunal on June 5, 2002, the worker's wife requested an extension of time to file an appeal of the July 6, 1999, decision. On May 16, 2002, the Registrar denied the request for an extension of time as there was a lack of evidence of any attempt to appeal the decision in the intervening three-year period. The worker's wife sent a follow-up letter of explanation. On September 20, 2002, following receipt of submissions, the Registrar again denied the request.

A worker's advisor requested a reconsideration of the Registrar's decision on April 15, 2003. He filed a Notice of Appeal of the hearing officer decision at the same time. WAP argued that the tribunal had implied power to reconsider and the Registrar's action was a "ruling," not a decision.

The panel observed that the Registrar acted as an appeal commissioner under s. 238, not as an officer or employee under s. 241(2). The position of registrar is a position created by the Chief Appeal Commissioner for administrative convenience, and there is authority under s. 240 for the tribunal to determine its own procedures. The panel noted that the Registrar applied the practice direction respecting the extension of time to file an appeal.

While a time limit may be extended by the tribunal where injustice would otherwise result (s. 240(2)), the act does not permit reconsideration of the tribunal's decision (s. 252(2)). In seeking to interpret whether the Registrar's action was a "decision," the panel considered that s. 256(1) allows an appeal to the Nova Scotia Court of Appeal for "a final order, ruling or decision." The Registrar's action was "final" because it disposed of all issues in controversy. The impact was substantive, not just procedural. The panel felt that, for example, a determination such as changing the mode of hearing was procedural and could be reconsidered. Similarly, any interim order or ruling could be reconsidered prior to a final decision.

The panel felt the Registrar's action was probably a final ruling and had a substantive impact. However, the panel stated that it was unnecessary to determine if the Registrar's action was a "final ruling" or "final decision." The panel also felt it was unnecessary to decide whether the denial of an extension of time to appeal is an exercise of the tribunal's powers to confirm, vary, or reverse the decision of a hearing officer. Instead, the panel applied common law principles.

Absent statutory authority to re-visit matters, the principle of *functus officio* applies to administrative tribunals on policy grounds. It is to be applied more flexibly and less formalistically than by courts. The panel found no relevant exceptions to the *functus* principle, such as a breach of natural justice or a lack of or exceeding jurisdiction. The panel did not feel that allegedly being wrong on the evidence or the existence of new evidence qualified as exceptions. Therefore, on the evidence before the panel, the final ruling or decision should not be reconsidered.

AMA Guides

Decision 2004-119-AD (July 14, 2004, NSWCAT) considered the interpretation of the AMA Guides as they applied to determine the level of impairment as a result of an injury to a worker's back. The following passage is notable:

> ...Under the AMA Guides, however, spinal impairments are usually determined on the basis of the diagnosis-based estimates (DRE's). The DRE categories applying to lumbosacral injuries are located at pp. 102–103. In order to determine the degree of impairment, one chooses the most appropriate category on the basis of the most serious symptoms demonstrated at the time of injury. The results of treatment, whether they be successful or not, do not affect the permanent impairment rating.

Arising out of and in the course of employment

In *Decision 2004-231-AD* (August 31, 2004, NSWCAT), a snowplow operator was called to work outside his normally scheduled shift during a "late season" storm to clear roads. He was generally "on call" only during the storm season. He was involved in a MVA and suffered injuries as a result.

In the typical employment situation, there is no recognition of an injury-accident which occurs during a commute to work. The general "common law" rule is that an injury on the way to work does not arise out of and in the course of employment. The hearing officer found the injury to be compensable. The tribunal agreed, relying upon the existence of: (i) a special request for the worker to come to work by the employer; and (ii) hazardous highway driving conditions due to the particular snow storm the worker was to deal with as a snow plow operator. This amounted to an increased risk. Reference was made to the *Penney* panel decision, *Decision 2003-648-TPA* (February 24, 2004, NSWCAT) and to "the flip side to recognition – the statutory bar to a civil action."

The appeal commissioner distinguished Ontario cases that were premised upon a specific board policy.

Stress

Decision 2002-661-AD (August 31, 2004, NSWCAT) considered a claim for stress under the act requiring a determination of whether a traumatic event had occurred at the workplace. The event in question was a meeting between the worker, his supervisor, a union representative, and another supervisor arising out of an investigation conducted by the worker, and a difference of opinion as to the handling of the matter as a result of the investigation. The meeting culminated in a heated dispute including the threat of physical violence leading to the worker feeling that an anxiety attack was imminent. The worker was suspended from work the following day.

The tribunal referenced *Decision 2003-427-AD* (February 27, 2004, NSWCAT) in which it was found that a "traumatic event" was an event which is "something other than the common workplace experiences of the particular worker."

The tribunal considered the nature of the worker's employment (a caring profession requiring specific credentials and training); the nature of the meeting (to discuss a serious disciplinary matter); that the supervisor's charge of lack of professionalism against the worker were inappropriate to the meeting and personal in nature; and that the supervisor initiated the physical aggression, to which the worker responded. The tribunal found that the meeting was an event not of the kind he would normally experience in the workplace.

The medical evidence established that the worker's mental health deteriorated after the meeting and led to the development of post-traumatic stress syndrome, despite pre-existing anxiety attacks brought on by workplace stress generally.

In *Decision 2004-438-AD* (November 25, 2004, NSWCAT), the worker was a snowplow operator who sought recognition of a post-traumatic stress claim after striking a parked vehicle while operating a plow, and also believing that he had also struck the vehicle owner standing beside it.

This decision, while involving a unique fact situation, clearly sets out the definitions of "accident," "traumatic event," and "acute reaction" before applying the definitions to the facts to find that, while the event was traumatic, the worker's response to the incident was not an acute reaction.

Survivor Benefits

Decision 2003-890-AD (November 16, 2004, NSWCAT) dealt with a worker who suffered a stroke – a condition the tribunal does not often encounter. The appeal commissioner declined to address the employer's concerns that it may have been negligent in some way. Negligence or wrongdoing was not an issue before him. Apparently, after an uneventful day on the job as a welder, followed by an evening in which he consumed alcohol, the worker suffered a stroke. He was found the next morning in his hotel room by a co-worker.

Research indicates risk factors or co-morbidity associated with strokes include trauma (both minor and severe), cigarette use, high alcohol consumption, and low high density lipid levels. Some strokes are felt to be of spontaneous origin. There was no evidence of a work-related trauma. The worker was a former smoker (although not enough time had passed to eliminate this as a factor), there was insufficient evidence as to the amount of alcohol consumed, and there were no demonstrable symptoms associated with a stroke seen by co-workers prior to discovering the worker in a disabled state.

The appeal commissioner found a lack of a causal link between work and the stroke and denied the appeal.

Decision 2004-42-AD (July 28, 2004, NSWCAT) considered a claim for survivor benefits. A worker with a 100 per cent permanent medical impairment rating had died. Section 36 provides that where a worker has a PMI rating of 100 per cent at the time of his death, his death is presumed to be the result of his injury unless there is sufficient evidence to rebut the presumption. The worker's PMI was for a back injury which, over time, had worsened to such an extent that the worker was dependent on a wheelchair. His cause of death was listed as a stroke, due to atherothrombotic disease. The board concluded that it had rebutted the s. 36 presumption, as there was no material causal relationship between the worker's compensable condition and death. The worker's treating specialist filed an additional medical report linking the two: decreased physical activity and progressive immobility (which was the result of his back injury) had a "significant effect on his immediate cause of death."

The tribunal concluded that the board had not rebutted the presumption, and that the worker's injury materially contributed to his death. Survivor benefits were payable.

Firefighters' Regulations

In August, the tribunal heard its first appeal under the Firefighters' Compensation Regulations enacted pursuant to s. 35A(5) of the act. A worker's widow was appealing a hearing officer decision finding that the deceased worker did not develop a primary-site cancer that fell within the regulations. The appeal was denied in *Decision 2004-304-AD* (August 23, 2004, NSWCAT) on the basis of medical evidence indicating that the worker's death was due to primary-site lung cancer, which was not one of the primary-site cancers listed under the presumption. The cancer had spread to other areas covered by the presumption.

Decision 2004-309-AD (October 25, 2004, NSWCAT) involved another claim for recognition by a firefighter of primary-site clear cell carcinoma as an occupational disease. The type of cancer in question did not engage the presumption found in s. 35A of the act.

The case considered the worker's claim in the face of a 25-year-pack-a-day smoking habit. The tribunal found that there was no medical opinion evidence which would counter the conclusion that cigarette smoking was the most likely cause of the cancer. Reference was made to the earlier *Decision 2003-430-AD* (October 13, 2004, NSWCAT) respecting smoking and the development of various cancers.

Medical Aid

Decision 2004-487-AD (January 24, 2005, NSWCAT) involved the worker's claim for coverage of chiropractic treatment by a physician who was not a board-approved service provider. The chiropractor advised the worker prior to the first treatment that he did not deal with the board, and so it was up to the worker to pay the doctor and seek reimbursement from the board. The board refused to reimburse the worker on the basis that the doctor was not an approved service provider. Upon a consideration of ss. 102, 105, 106, 108, and 109 of the act, the tribunal concluded that the act endorsed the board's supervision and control of medical aid, and rejected the worker's contrary argument.

Board Policy 3.4.1R

Decision 2003-874-AD (April 28, 2004, NSWCAT) reviewed an extended earnings-replacement benefit calculation and found that the board had erroneously included both deemed earnings and Canada Pension

Plan (CPP) benefits in calculating the worker's loss of earnings. The tribunal found that the board could only include either the deemed earnings or the CPP benefits, but not both.

The tribunal found that the Legislature had intended that the three types of earnings listed in s. 39 (actual earnings, deemed earnings, and CPP) be treated as "mutually exclusive alternatives." The use of the conjunctive "and" in s. 4 of Policy 3.4.1R is inconsistent with the act.

This same issue was later addressed in *Decision 2004-126-AD* (February 15, 2005, NSWCAT). The worker's post-injury earnings were calculated on the basis of 50 per cent of her CPP disability benefits. The board reviewed the extended earnings-replacement benefit at 36 months, and decreased her benefit by including long-term disability (LTD) benefits with the CPP benefits as post-injury earnings. The worker appealed on the basis that her LTD benefits were not "earnings" and should not have been included as such. She also argued that only one of the contingencies in s. 38 (actual earnings, deemed earnings, or CPP) should be used, and that they are mutually exclusive.

The tribunal noted s. 42 of the act, stating that gross earnings are regular salary or wages and any other types of income prescribed by regulation. The appeal commissioner noted Policy 3.1.1R2, which expanded "regular salary or wages" to include other types of employment income allowable on the "Employment Income" and "Other Employment Income" lines of an individual tax return. This expansion was not included in the regulation, and it was argued that s. 42 required the inclusion of other types of income by achieved by regulation, not policy.

The worker's LTD benefits had been reported on line 104 (Other Employment Income) of her tax return. A Revenue Canada interpretation bulletin provided that such amounts are included in income but subject to a reduction for contributions made by the employee.

The tribunal found that reliance on the interpretation bulletin was consistent with prior tribunal decisions finding Revenue Canada data an appropriate source for the calculations used in Policy 3.1.1R1. The appeal commissioner assumed that Policy 3.1.1R2 was consistent with s. 42 (no argument was made that it was inconsistent), and determined that the LTD benefits were properly considered in the calculation of the worker's post-injury earnings. The appeal commissioner noted

the nature of the income in question and that they were paid because of the worker's status as an employee, and are therefore earned because of the worker's office or employment. With respect to the argument that inclusion of these types of income needed to be by regulation, the tribunal found that the inclusion was in line with the underlying principle of earnings-replacement benefits, combined with the board's broad policy making power in s. 183(2) of the act.

With respect to the argument that the board could only use one of the alternatives listed as sources of income listed in s. 38, the tribunal noted the opposing tribunal decisions on the point, and decided that the language of the section provided the board with wide latitude to structure a policy that covered all the possible contingencies, and that there may be situations where the alternatives in s. 38 were not mutually exclusive. The tribunal found a more plausible explanation of s. 38 was that the three types of income would be considered in determining a worker's actual loss of earnings. The tribunal noted that the conjunctive "and" in Policy 3.4.1R1 did not necessarily mean the amounts would be added together as they would be in a deeming situation.

On the facts of this case, the tribunal held that the board properly included in post-injury income the worker's CPP benefits and LTD benefits, as these were actual income the worker received as the result of joint contributions from herself and her employer. This did not offend the act or regulations, and was consistent with the earnings-loss regime adopted in 1996.

Innovation

On February 22, 2005, the tribunal's support staff and appeal commissioners held a day-long strategic planning session to review the past year's accomplishments and to identify objectives and initiatives for the fiscal year 2005–06. Several key initiatives were completed in achieving our strategic goal of delivering high-quality service in the resolution of appeals.

In the last half of the year just ended, emphasis was placed on completing our case management review process to implement a more streamlined and efficient appeal management system. The board's Information Technology department worked with the tribunal to develop new reports using the board's AS400 database, which will allow the tribunal to track more efficiently the status of appeals.

- The tribunal prepared a draft Practice Manual incorporating all current practices and policies. The draft was circulated for feedback to all regular tribunal participants, including the WAP, the board, injured workers' groups, and employer representatives, and has now been adopted by the tribunal. The Practice Manual is designed as a reference tool for both the tribunal and participants who appear before it. The purpose of the manual is to better ensure fairness, predictability, consistency, transparency, and efficiency in all functions performed by the tribunal. The tribunal took the opportunity to meet with regular participants to discuss implementation of the Practice Manual, together with any other issues of concern.

- A new Notice of Appeal has been prepared and is now available from the tribunal and on the tribunal's website. The most significant change to the Notice of Appeal reflects the adoption of a readiness procedure as outlined in the tribunal's new Practice Manual. The readiness procedure is the result of two pilot projects undertaken in the past year respecting the scheduling of appeals by oral hearing with the Halifax workers' advisers, and the scheduling of appeals proceeding by written submission with the Sydney workers' advisers. The docket-day process used in the first pilot project has now been expanded to include a docket day by conference call for the Sydney workers' advisers. Both workers' advisers offices have responded favourably to the adoption of the docket-day process for oral hearing scheduling.

Another factor in the development of that procedure was the limited success of the projects in meeting minimum volume standards. For this reason, the readiness procedure sets out parameters limiting the length of time an appeal with the tribunal may remain outstanding without proceeding to adjudication. There has, however, been some reduction in the number of appeals for which deadline extensions have been sought.

- Revision of the tribunal's letters marking milestones in the life of an appeal continues, to enhance clarity and to reflect changes in our procedures. One important addition is a letter sent to participants advising whether a worker's employer will be participating in an appeal.

Appeal streaming will continue to be a focus for the Registrar in the coming year, including the development and implementation of more specific streaming criteria, the enhancement of systems to support additional appeal streaming, and the development of baseline measures for processing and scheduling appeals. These means of enhancing case management are of particular importance given the increasing complexity of appeals as measured by the nature and number of issues under appeal, and an increasing rate of employer participation.

- The tribunal finalized an outline of parameters for performance measures in light of its statutory mandate, addressing, particularly, timeliness and communications concerns raised in a previous worker survey.

- The tribunal began revising its website with the assistance of Communications Nova Scotia. The tribunal also revised three information pamphlets, entitled *Appealing a Hearing Officer Decision; A Guide to Oral Hearings;* and *A Guide to Appeals Proceeding by Written Submission;* and prepared a new pamphlet entitled *Employer Participation.* These pamphlets are designed to provide unrepresented participants (workers and employers) with easily accessible, basic information on tribunal proceedings.

- The tribunal completed its Self-Represented Worker Project, implementing a new approach to assist self-represented workers with the appeal process. The project objectives were aligned with the results of our initial worker-satisfaction survey conducted in the summer of 2003. The tribunal implemented a self-represented worker procedure which includes direct telephone contact to assist the worker with his or her understanding of the appeal process. As well, a FAQ (Frequently Asked Questions) protocol was developed for the use of tribunal staff to improve telephone communication with clients.

The tribunal has not had an opportunity to conduct a separate study of self-represented participants to determine their level of satisfaction with the new services provided by the tribunal. However, the increase in pre-hearing contact with self-represented participants has resulted in the tribunal being able to shorten the time that it takes to resolve appeals from self-represented participants. The increase in the number of appeals proceeding by oral hearing appears to generate a greater feeling among self-represented participants that they have been fully heard.

The feedback received by appeal commissioners making the pre-hearing telephone contact, and the feedback received at the hearing of appeals of self-represented participants, has been very positive. Anecdotally, it appears that this initial personal contact with self-represented participants has increased their understanding of the appeal process and has helped significantly in reducing their anxiety about attending a hearing before the tribunal.

- Appeal commissioners participated in training sessions in decision writing, the conduct of an oral hearing, and American Medical Association training (see Inter-agency Cooperation).

An employee-satisfaction survey was completed, which identified internal opportunities for improvement.

Appeal commissioners adopted a code of conduct.

Staff were offered many training opportunities to better handle appeal management and communication with tribunal stakeholders.

Appeals Respecting Tribunal Decisions

Background

An appeal may be brought from a tribunal decision to the Nova Scotia Court of Appeal on any question as to the jurisdiction of the tribunal or on any question of law. Tribunal decisions are reviewed on a higher standard of correctness than are the decisions of workers' compensation appeal tribunals in other provinces.

When the Court of Appeal reviews a tribunal decision, it may overturn the decision if it disagrees with the tribunal's legal interpretation. In most other provinces, a court cannot overturn an appeal tribunal decision merely because it disagrees with a tribunal's legal interpretation. Instead, it must also find the legal interpretation to be "patently unreasonable."

An appeal to the Court of Appeal is a two-step process. First, the person wanting to bring the appeal must seek "leave to appeal." This means that he or she must convince the court they have a "fairly arguable" issue. Generally, if the court finds that an appeal does not raise a fairly arguable issue, it will deny the application for leave to appeal, without providing reasons. Second, if leave to appeal is granted, the court will hear the appeal and issue a decision on its merits.

During the year 2004–05, 25 appeals from tribunal decisions were filed with either the Court of Appeal or the Supreme Court of Canada:

- Workers appealed 12 tribunal decisions to the Nova Scotia Court of Appeal (seven by unrepresented workers, four by the Workers' Advisers' Program, and one by outside counsel).
- Workers asked for leave of the Supreme Court of Canada to hear two appeals.
- Employers appealed 10 tribunal decisions to the Court of Appeal.
- The WCB appealed one tribunal decision to the Court of Appeal.

During this fiscal year, appeals were resolved as follows:

- Four appeals to the Court of Appeal and one application for judicial review to the Supreme Court of Nova Scotia were discontinued; two other appeals not perfected were considered to have been discontinued.
- The Court of Appeal dismissed, without reasons, eight appeals at the leave stage; the Court allowed one application for leave, at the leave stage.
- The Supreme Court of Canada dismissed one appeal, at the leave stage.
- The tribunal agreed to rehear five appeals.

- The Court of Appeal allowed four appeals and the Court dismissed an appeal following a hearing on the merits.

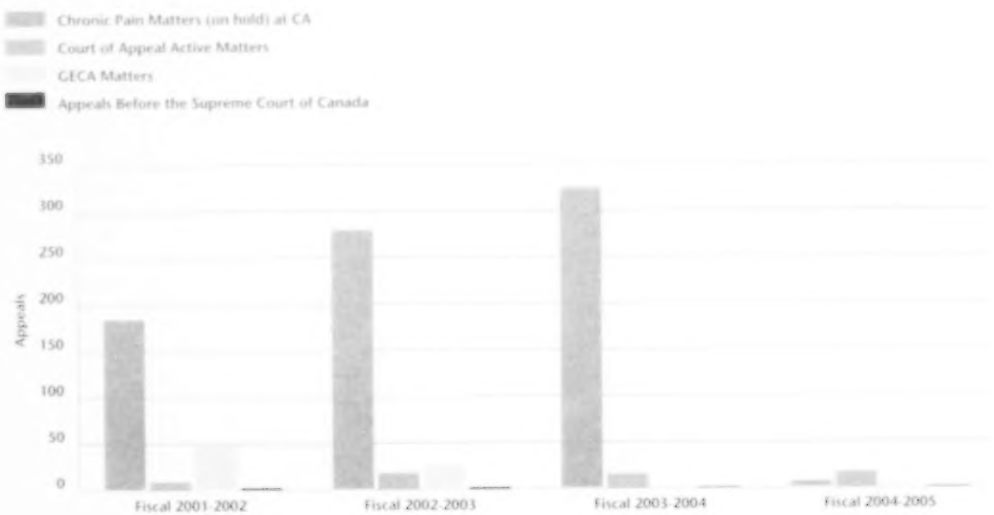
At the end of fiscal 2004–05, there remained 18 active appeals, 17 at the Court of Appeal, and one at the Supreme Court of Canada (see Figure 10).

Decisions from the Court of Appeal

In *Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2004), 224 N.S.R. (2d) 276, the appeal raised, but did not fully resolve, several difficult issues concerning federal employees' gradual-onset stress claims under the Government Employees Compensation Act, R.S.C., 1985, c. G-8 [GECA].

The Court of Appeal held that the tribunal erred in law when it found that the question of a causal link between the stress and the workplace incidents was a matter exclusively for medical experts. The court stated

Figure 10
Appeals Before the Courts



that while expert evidence will often be of great assistance in determining causation, it is neither necessary or necessarily conclusive. Causation is a practical question of fact which can be answered by ordinary common sense. The court further held that the tribunal erred in law in finding that neither the nature of workplace incidents, nor the reaction of other employees, was relevant to the causation question.

Given these errors, the court referred the appeal back to the tribunal for a new hearing. It did not address whether a gradual onset stress claim could be a "personal injury by accident" under GECA. It also did not address whether a stress-based injury must be a reasonable reaction to the triggering event or events. Instead, the court stated about that issue:

> It is an intricate and difficult one with many ramifications, including possible Charter considerations, not all of which have been explored in this case. I would prefer to address this issue, if necessary, once WCAT's jurisprudence on this difficult point has matured and in the context of a case in which all of its ramifications have been fully explored.

In *Boyle Estate v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2004), 225 N.S.R. (2d) 69, the court dealt with the tribunal's jurisdiction to award interest on delayed benefits.

The worker suffered a heart attack at work in 1988. He, and later his estate, brought a series of appeals attempting to establish entitlement to benefits. Finally, in June 2000, almost 12 years after the injury, the worker's widow received payment of a retroactive permanent impairment benefit based on a 100 per cent permanent medical impairment rating for the period August 16, 1988, to February 14, 1994 (when the worker passed away). She also received survivor benefits.

She then asked the board to pay her interest on the delayed benefits, but it refused, finding it lacked jurisdiction. On appeal, the tribunal directed the board to pay interest, but the board appealed that decision to the Court of Appeal.

The Court of Appeal found that the tribunal did not have the authority to direct the board to pay interest. While the court found that the term "compensation" usually includes interest, it held that the phrase "as provided by this part" in s. 10(1) of the Workers' Compensation Act, qualifies the ordinary meaning of the word "compensation."

It found that the payment of interest would be have to be authorized by an amendment to the act, or a regulation (or possibly by a policy passed by the board of directors of the board). It stated that it was the intention of the Legislature that the board, through the regulatory or policy-

making process, maintain some control over the expansion or refinement of specified benefits.

In *Fowler v. Nova Scotia (Workers' Compensation Board)* (2004), 225 N.S.R. (2d) 87, the Court of Appeal overturned a tribunal decision which had found that the board could not charge a 10 per cent levy on third party recoveries to cover the internal operating expenses of its third party unit.

In certain circumstances, a worker collects benefits under the act, and the board sues in the worker's name to collect damages from a third party. If a settlement or judgement is reached, the board keeps enough of the money to cover the worker's benefits, its cost of recovering the money, plus a 10 per cent administration fee to cover its internal expenses of running the third party unit. The excess recovery amount goes to the worker.

Mr. Fowler challenged the 10 per cent levy. The tribunal found that the board was not authorized to charge the 10 per cent levy.

The Court of Appeal found that the phrase "other expenditures" in s. 31(2) of the act is broad enough to include the board's internal operating expenses incurred in pursuing a third party claim. The board can charge a 10 per cent levy on third party recoveries.

In *Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2004] N.S.J. No. 442, the Court of Appeal had to decide whether the current Workers' Compensation Act (1996) allows the board to withhold ongoing compensation payments from a 1986 accident, where the worker had settled a lawsuit against his employer for the workplace injury in 1991.

Mr. Dipersio was injured while temporarily outside Nova Scotia on an oil rig in 1986. He sued his employer in a Texas court in 1988. Starting in 1989 the board began paying him permanent benefits. He received a cash settlement of the Texas lawsuit from his employer in 1991. In a 2002 decision, the board sought to withhold payment of compensation until the amount of the settlement was exceeded, and then reinstate compensation, relying on s. 32 of the act, which came into force in 1996.

Section 32 of the act allows the board to withhold compensation where a worker has right of action outside Nova Scotia, but has not assigned the right to collect the damages from that action to the board. The Court of Appeal held that the phrase in s. 32 "has a right of action" speaks only in the present tense. Mr. Dipersio's action was settled before s. 32 come into force in 1996. He no longer had a right of action in 1996, so the board could not withhold compensation.

The tribunal decision had cited the "historic tradeoff" in support of its conclusions. Under the historic tradeoff, workers relinquished their causes of action against their employers in courts and, in return, gained compensation under the statutory no-fault scheme. Employers pay assessments on wages, but not damages in courts.

The Court of Appeal rejected the tribunal's use of the historic tradeoff to support its conclusions, stating, "The historic tradeoff does not amend the statute. The statute governs."

In *Children's Aid Society of Cape Breton-Victoria v. Workers' Compensation Board (NS), the Workers' Compensation Appeals Tribunal and James MacNeil* 2005 NSCA 38, the court dismissed the employer's appeal and upheld the tribunal's decision.

This was a stress claim under the act. The issue most strongly argued on appeal was that the tribunal's findings of fact were not supported by the evidence.

The tribunal had made two key findings. It concluded that a February 2002 meeting constituted a traumatic event. It also concluded that Mr. MacNeil had an acute reaction to this event giving rise to a post-traumatic stress disorder and exacerbating his pre-existing anxiety disorder. He, therefore, had suffered a compensable injury under the act.

While the employer had filed a memorandum concerning the February 2002 meeting with the tribunal, it otherwise maintained a watching brief at his tribunal hearing. The court stated, "WCAT rightly held that in the absence of supporting documentation from the worker's personnel file, the absence of oral evidence on behalf of the appellant, and the absence of any challenge to his credibility, that memorandum could be given little weight." On the issue of the traumatic event, the court found that there was evidence to support the tribunal's conclusion that the meeting consisted of personal attacks on the worker, aggressive behaviour by the supervisor, and a real and imminent threat that the meeting would become violent. The court stated, "While perhaps not every fact-finder would have drawn the same inferences from the record which WCAT did, it cannot be said that there was no evidence to support them."

On the issue of acute reaction, the court found that the worker's uncontradicted testimony, his psychiatric diagnosis, and his medical history all support the tribunal's conclusion. The court stated that as the conclusion is supported by the record, it cannot be said to be "bordering on the absurd, clearly irrational or evidently not in accordance with reason." Essentially the court deferred to the tribunal on the findings of fact.

Inter-agency Cooperation

The past year also saw many inter-agency projects including an Advanced Decision Writing workshop involving appeal commissioners from the tribunal and hearing officers from the board's Internal Appeals department. One of the objectives of the workshop was "to bring a reader-oriented perspective to making and writing decisions." This was aligned with the WSIS strategic goal of improving service delivery and specifically addressed joint agency training and increasing understandability of communication.

The tribunal participated in a training program intended for the adjudicators in the board's transition services team. The tribunal provided an overview of the its mandate and operations as well as an overview, from a historical perspective, of the tribunal's interpretation of the chronic pain legislation. A second session was also held involving other board case managers and medical advisors.

In October 2004, the tribunal hosted a one-day conference on the application of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"). The AMA Guides are well-accepted guidelines in the medical community. They are used by the board in recognizing and quantifying permanent medical impairments for workers injured on and after January 1, 2000.

The conference was truly unique and tailored to the needs of attendees. Two specialists from Ontario, a neurologist and an orthopaedic surgeon, gave presentations on upper and lower extremity and back impairments. The neurologist and a board physician also spoke about pain-related impairments and recent regulations and policies to be applied with respect to chronic pain under the act.

While the tribunal took the lead in planning and organizing this conference, it was a cooperative venture sponsored by the tribunal, the Workers' Advisers Program, and the Workers' Compensation Board. Members from all three agencies attended the conference, including first-line board decision makers; board hearing officers; board managers; board medical advisors; worker's advisers; and tribunal appeal commissioners. The conference was both timely and well received.

The tribunal also participated in the following joint initiatives with partner agencies in WSIS:

- an Issue-Resolution Working Group composed of representatives of WCAT, WAP, WCB Internal Appeals, and WCB Client Services division whose mandate is to develop and implement issue-resolution initiatives which will support and improve communication, information sharing, and overall efficiency of the workers' compensation system.

- an Appeal Issues Discussion Group made up of representatives of WCAT, WAP, and the WCB facilitates the informal exchange of information between the three levels of workers' compensation decision making about recurrent issues and their resolution.

- a WSIS performance measures advisory committee formed to review and revise, or propose new, performance standards for the system as a whole.

The Acting Chief Appeal Commissioner participated in the coordinating committee meetings involving the four WSIS agencies. The mandate of the coordinating committee is to meet on a regular basis to oversee and improve joint initiatives undertaken by the partner agencies and to promote cooperation in the implementation of the system strategic plan.

Financial Report

Financially, the tribunal's total expenditures were within 71 per cent of the original authority and within 95 per cent of our revised forecast.

Expenditures for 2004–05 were actually 13 per cent under the expenditures for 2003–04, totaling $1,277,005.83. This was due to several unforeseen events including an appeal commissioner taking a one-year leave of absence, the former Chief Appeal Commissioner leaving for a two-year term with Justice in early July, and reduced rent expenses because of a forced relocation to the World Trade and Convention Centre following a flood at 5151 Terminal Road (see Figure 11).

Figure 11
Budget Expenditures
(for the Fiscal Year Ending March 31, 2005)

Significant Changes

This year was also marked by other significant changes.

In July 2004, Katherine Carrigan, former Chief Appeals Commissioner, resigned her position to accept a position with the Department of Justice. Louanne Labelle was appointed Acting Chief Appeal Commissioner in her stead.

At the end of November 2004, the tribunal moved into new premises at 5670 Spring Garden Road. The purpose-designed space provides the tribunal with facilities to host two hearings simultaneously. The premises are accessible and provide parking to our clients at the nearby Spring Garden Place, including accessible parking.

Key Initiatives for the Coming Year

Key initiatives for the coming year include the setting of benchmarks for the performance targets and measures as established by the tribunal, as well as completing the review of performance measures for individual appeal commissioners aligned with the tribunal's measures.

The tribunal will repeat worker and employee surveys and continue revising our website.

We will closely monitor the implementation of our appeal management initiatives, particularly flexible scheduling and appeal readiness policies.

We will cooperate with our partner agencies in implementation performance measures for the system and revising the system strategic plan.

Appendix 1

Figure 1
Decisions by Appellant Type

	Oral Hearing	Paper Review	Total
Worker Claim Appeals	284	454	738
Employer Claim Appeals	13	17	30
Employer Assessment Appeals	9	2	11
Section 29 Applications	2	2	4
Total	308	475	783

Figure 2
Appeals Received

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 01-02	80	78	70	77	96	71	84	100	98	93	70	87	1,004
Fiscal 02-03	85	72	71	96	65	68	80	83	129	58	61	59	927
Fiscal 03-04	70	83	94	76	97	48	81	86	87	71	42	55	890
Fiscal 04-05	47	36	76	70	55	40	53	58	72	48	36	68	659

Figure 3
Decisions Rendered

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 01-02	55	66	63	67	59	53	61	89	71	87	72	87	830
Fiscal 02-03	87	79	78	83	69	57	59	78	41	58	64	78	831
Fiscal 03-04	97	83	70	69	58	43	83	60	50	24	34	56	727
Fiscal 04-05	53	53	35	45	108	174	53	40	54	65	55	48	783

Figure 4
Decisions by Mode of Hearing

	Oral Hearing	Paper Review	Total
Fiscal 01-02	250	580	830
Fiscal 02-03	291	540	831
Fiscal 03-04	295	432	727
Fiscal 04-05	308	475	783

Figure 5
Timeliness to Decision (cumulative percentage)

	1	2	3	4	5	6	7	8	9	10	11	11
Fiscal 01-02	0.24	0.60	2.29	27.29	63.65	79.35	88.65	92.75	95.17	96.86	97.58	100
Fiscal 02-03	0.24	0.97	3.50	28.71	65.14	81.06	87.33	92.88	95.30	96.14	97.47	100
Fiscal 03-04	0.00	0.55	5.36	32.42	61.26	74.59	82.97	87.50	91.62	94.51	95.60	100
Fiscal 04-05	1.02	4.19	14.61	30.11	43.58	53.37	60.61	65.06	70.01	74.71	80.18	100

Figure 6
Decisions by Issue Categories – Worker

Recognition of Claim	67
New/Additional Temporary Benefits	231
New/Increased Benefits for Permanent Impairment	249
Medical Aid (Expenses)	140
New/Additional Vocational Rehabilitation	13
New/Additional Extended Earnings Replacement Benefits	87
New Evidence	43
Wage Rate/Other Calculation Issues	13
Survivor Benefits	13
Chronic Pain	211
All other issues	79
Total	1,146

Figure 7
Decisions by Issue Categories – Employer

Acceptance of Claim	16
Extent of Benefits	14
Assessment Classification	5
Assessment Penalties	2
Other Claims Issues	0
Other Assessment Issues	4
Total	41

Figure 8
Decisions by Outcome

Allowed	232
Allowed in Part	75
Denied	182
S29	4
RTH	290
Preliminary Decisions*	1
Supplementary Decisions*	1
Correcting Decisions*	5
Total Final Decisions	783

** Do not reduce the number of appeals outstanding.*

Figure 9
Appeals Outstanding at Year End

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 01-02	353	362	364	371	404	415	433	426	445	435	428	419
Fiscal 02-03	399	386	368	372	358	361	370	363	445	437	424	398
Fiscal 03-04	365	361	378	380	411	413	406	425	457	501	501	489
Fiscal 04-05	479	460	491	510	453	317	309	325	341	319	292	302

Figure 10
Appeals Before the Courts

	Chronic Pain Matters (on hold) at CA	Court of Appeal Active Matters	GECA Matters	Appeals Before the Supreme Court of Canada	Total
Fiscal 01-02	183	9	50	2	244
Fiscal 02-03	279	18	25	2	324
Fiscal 03-04	323	16	0	1	340
Fiscal 04-05	6	17	0	1	24

Figure 11
Budget Expenditures
(for the Fiscal Year Ending March 31, 2005)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,438,100.00	$1,059,600.00	$1,049,706.96
Office Rent, Purchases, Dues, Taxes & Rentals	$190,000.00	$147,000.00	$120,358.64
Supplies & Services	$40,000.00	$53,000.00	$45,843.17
Travel	$50,500.00	$50,000.00	$47,346.33
Special Services	$115,000.00	$46,500.00	$28,750.73
Sub Total	$1,833,600.00	$1,356,100.00	$1,292,005.83
Less Recoveries	$37,000.00	$15,000.00	$15,000.00
Totals	$1,796,600.00	$1,341,100.00	$1,277,005.83